No. 681.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

R. D. HUME, claimant of the schooner Berwick, her tackle, apparel, furniture and cargo,

Appellant,

vs.

J. D. SPRECKELS & BROS. CO.,

Appellee.

Appellee's Brief.

NATHAN H. FRANK,
Proctor for Appellee.

Pernau Bro. Print, 548 Clay St., S. F.

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APPELLEE'S BRIEF.

This appeal is principally founded on exceptions to the findings of the District Court upon questions of fact, and appellant has based his statement of the case upon what he thinks the Court should have found, rather than upon what the Court did find. Inasmuch as there is a conflict of testimony, the appeal involves the credibility of the witnesses, and a consideration of the testimony in support of as well as that against the finding of the Court. Since appellee contends for the correctness of the finding of the District Court, it

necessarily, in view of this conflict of testimony, disaffirms the appellant's statement of the case. The difference between us relates more particularly to the danger in which the schooner "Berwick" was; the nature of the agreement under which she was originally taken in tow by the "Fulton", and to the circumstances under which the "Escort" was substituted for the "Fulton". As these matters will be the burden of our discussion, we deem it unnecessary, at this time, to make a separate detailed statement of the facts.

The service began when the "Fulton" picked the "Berwick" up.—The first and most important step in any discussion is to determine what the disputed points are. The oral argument disclosed the fact, that while upon some points appellant and appellee were apparently taking opposite sides, they were not in fact discussing the same matter. Appellant insists that when the "Escort" came alongside, the "Berwick" was then in tow of the "Fulton", and therefore safe; hence, he concludes the services of the "Escort" would not be salvage services. Whether this proposition be sound or unsound is beside the issue, because our claim is not based upon the condition of affairs as they existed at the time the "Escort" came alongside, but upon the condition of affairs *at the time the "Fulton" picked the "Berwick" up.* The appellant is himself committed to this view by the III point made in his brief (p. 10), namely, that "the

" 'Escort' became *merely a substitute for the 'Fulton'* in " towing the 'Berwick' into Astoria, and in performing " the duty which belonged to the 'Fulton' ". In making this point he practically states our position, for we contend that the service of the two vessels was one entire service, and that we are under the circumstances entitled to compensation for the whole.

Having regard, therefore, to the common ground thus established, the real point of departure between us is in the view taken of the nature of the contract between the "Fulton" and the "Berwick"—appellant contending that it was a mere towage contract, and appellee contending that it was a salvage contract.

The first question that presents itself is:

Was the service rendered in the case at bar a salvage service?

It is well settled that where the vessel to which the service has been rendered is in danger "either present " or to be reasonably apprehended", the service is a salvage service.

M'Connochie vs. *Kerr*, 9 Fed. 53.

> " 'Mere towage service', says Dr. Lushington, (The Reward, 1 W. Rob. 177), is confined to vessels that have received no injury or damage; and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damages or accident" *Id.*

The District Court has found (p. 18), that "the 'Ber-
" wick' was so badly injured that she could not have
" lived at sea, nor could she have gotten into port with-
" out the 'Escort', and the services performed by the
" 'Escort' were salvage services".

The testimony upon which this finding is based is as follows:

S. B. RANDALL, p. 22.

" She was leaking very badly, so much so that they
" had to keep all of the pumps at work while she was ly-
" ing at the wharf to keep her from sinking, and at the
" same time they had to discharge cargo. She was
" loaded with lumber and they discharged the cargo of
" lumber and repaired the vessel.

" The schooner was in such a condition that she
" could not possibly have lived at sea, nor could she
" have made any port without the assistance of the tug
" boat."

R. E. HOWE, p. 24.

" She was leaking very badly, and could not possibly
" have lived but a very short time at sea, nor could
" she have sailed into the Columbia River as the wind
" was blowing off shore."

It will be noted that this record does not purport to be a transcript of the trial by question and answer, but gives the substance only of the testimony incorporated in a bill of exceptions. It would be impossible,

therefore, to find internal evidences in the testimony upon which to ground an argument to discredit these witnesses. On the contrary, they having testified in the presence of the Court, and their testimony having been adopted as true, every presumption is in favor of their credibility. *The nature of this record*, therefore, as well as the fact that there is a conflict of testimony, stands in the way of any reversal of the findings of fact of the District Court.

The Alijandro, 56 Fed. 621.

The evidence on behalf of the claimant, also, while showing an evident desire to make light of the condition of the vessel, contains elements of contradiction that serve to discredit their story.

It appears that the vessel struck on the bar of the Nehalem river, and immediately thereafter the master signalled for the tug which had towed him to sea, but was unable to attract his attention.

CORNELIUS ANDERSON, the master, testifies (p. 34):

"We had a southerly wind, and of course I went " below to find out if the water was gaining; I finally " went down forward to see and I could see that the " vessel was making water, and I concluded then, " the wind being from the southward, that I would run " to Astoria.

" By all appearances the schooner was all right, as " far as it went.

"Q. How was the water? Was it gaining on you, "or not?

"A. No sir; we just kept her about the same way.

"Q. Could you not have sailed into the Columbia "River yourself?

"A. Yes sir; that is what we were doing. All that "day, of the 5th we had calm; we could not sail because "we had nothing to sail with. At about 4 o'clock in "the afternoon a Northwest breeze sprung up, when we "started to sail, and we had a very good breeze, which I "think would have brought us in if we had kept on "sailing." (p. 35.)

"I have an idea that I would have got in that night, "but of course I did not care as long as the man offered "himself, to *take any chances of the kind*, although I "had a very fine breeze at the time." (p. 41.)

CROSS EXAMINATION.

"Q. I notice in this extended protest that you say "you found two *heavy streams coming in in the fore* "*peak.* Is that the fact?

"A. *Oh, yes; you could see some coming in at both* "*sides.*

"Q. How much water did you have in when you "arrived off the Columbia bar?

"A. I could not say.

"Q. Did you sound it?

"A. I could not sound it.

"Q. Why could you not sound it?

"A. We have no particular way of sounding it. The

" only way I could see there would be that if it had ex-
" tended above the skin of the vessel, I could have seen
" it in the fore peak; if the water had been above
" the skin I could have discovered it forward." (p. 46.)

" Q. I suppose you kept your men at the pumps all
" the time, both day and night?

" A. Mostly all the day. * * *

" Q. You were not bound for Astoria?

" A. I was not bound there; I went in there on ac-
" count of getting the vessel's leaking looked after; I
" didn't know what might happen on the way down,
" and I would not take any chances on going down on
" account of the vessel leaking; *I did not know what
" might take place*, so I thought I would go into As-
" toria and do what I could do there; of course I didn't
" fancy it would be good policy to go on to San Fran-
" cisco like that." (p. 47.)

H. C. ANDERSON, the mate, testifies:

" After they struck they pumped for about 10 or 15
" minutes, and did not get any suck. We continued
" on our course out to the Westward, and we found
" that we could not get any suck on the pumps, and we
" saw the tug boat was not making any attempt to turn
" back; we saw him go up the river, and the Captain
" said: 'I guess the best thing we can do is to go to
" Astoria.'" (p. 54.)

PETER RINTOUL (seaman and cook), p. 69, says:

"I guess we could have made Astoria, but it would "be a matter of a day or two; of course the vessel was "not in any bad condition exactly; she was leaking "that much that it kept us pumping steady, as far as "that goes; we pumped right along, but lots of things "could have been done before she was really hard up; "we could throw the lumber off the vessel, and that "would help to lighten her up."

The protest signed by the master and Peter Rintoul —speaking of the time after she struck—sets forth:

"That the pumps were tried immediately but found "no water, but about 20 minutes afterwards the pumps "were again tried, and found to be *lots of water*, and "we immediately hoisted our flag; but no towboat in "sight; we immediately started our pumps but got no "suck, but kept the pumps going all the time; that "the captain went in the fore peak and to see about the "water in the hold, and found a *heavy stream* coming "in on both sides of the keel." (p. 88.)

The vessel was repaired at Astoria; the nature and extent of the damage must have been disclosed at that time, yet no witness who was at work upon her repair at said port is called.

Upon the oral argument appellant called attention to the fact that the master upon cross examination (p. 47)

testified:

" Q. What repairs did you make?

" A. Had the garboard streak re-caulked.

" Q. The whole thing?

" A. Along the keel we treated the whole thing.

" Q. On both sides?

" A. On both sides, yes, sir."

This is supposed to have been an answer to the suggestion that none of the repairers were called. We fail to see how this meets the contention. In the first place, the master was an interested witness, while the persons employed at Astoria would have been disinterested. In the second place, the master was not called on by the appellants to testify upon this subject, but what he did testify to was brought out on cross examination. That cross examination shows a very much more serious condition of affairs than appellant is willing to admit. The opening of the garboard streak on both sides of the keel for the whole length is a very serious matter. This, taken in connection with the fact stated in the Protest (p. 88) that he "found a heavy stream coming in on " both sides of the keel" tends to show that Captain Randall's statement that she was in such condition that she could not possibly have lived at sea, is more nearly correct than the contention of the appellant. The natural presumption is that the testimony of the workmen at Astoria would have corroborated Captain Randall rather than the Captain of the "Ber-

wick", had they been called.

Having regard, now, to the rule that to constitute salvage service it must be rendered to a vessel in danger " either present or to be reasonably apprehended", it appears to us that the foregoing testimony of appellant, taken by itself, conclusively shows the existence of danger "either present or reasonably to be appre- " hended". The master says that while he had an idea that he would have got in that night, the "Fulton" having offered he did not care "*to take any chances of the kind*". He had two heavy streams coming in in the forepeak, and he could not say how much water he had at that time, and had no way of sounding. He had started for Astoria because he "would not take any " chance of going down on account of the vessel leak- " ing". "*I did not know what might take place.*" His apprehensions of danger are apparent and not unreasonable.

Peter Rintoul, while testifying that the vessel was not in any bad condition exactly, says that it would have taken a day or two to have gotten into Astoria. That she was leaking so that it kept them pumping steady, but lots of things could have been done before she was really hard up, namely, she could have jettisoned her cargo. From this it is but reasonable to infer that the witness meant only to testify that the vessel was *not in extremity*, but it is not fair to

presume that he meant to say that she was in no danger, either present or reasonably to be apprehended.

However, whatever might be the effect of the foregoing testimony standing alone, it certainly destroys the effect of other more positive testimony on behalf of appellants, and taken as a whole their testimony is not sufficient to induce the Court to reverse the finding of the District Court with respect to the danger, when such finding is supported by such positive testimony as that of Randall and Howe above referred to.

Cases cited by appellant.—Neither do we think that the cases cited by appellants in support of their position are of any avail with respect to the question here presented.

In the case of *The Viola* the facts do not show the lightship to have been in any danger. She had broken from her moorings in a storm, but was a new vessel, schooner rigged, well provisioned, fully equipped with sails, boats and anchors, and was in charge of an assistant engineer and crew of six men, including the cook, had set sail and was ably handled. In view of these facts both the lower Court and the appellate Court found she was in no danger.

The case of *The Emily B. Souder* is of a like nature. Here, the steamer had lost the flanges of her propeller, and went into the port of St. Thomas

under sail, where, being unable to obtain another propeller she laid in an additional stock of provisions and *started from St. Thomas for New York under sail.* She met with no difficulty on her way up, and made from *six to eight knots an hour* with an open breeze. After being *twenty-eight days out*, and within between fifty and one hundred miles from New York, she sighted and signalled the steamer "Monterey", which took her in tow into the port of New York.

> "The Souder was at the time in all respects tight, staunch and strong, and in no respect disabled except in her propeller. She was well manned and provisioned, and approaching the coast under circumstances which gave no reason to anticipate that she would not in due time reach New York in safety."

Where a vessel has left a port of safety, as in this case *The Emily B. Souder* did St. Thomas, and set sail for another port toward which she had been proceeding in regular order, at a fair rate, for twenty-eight days, is a very different matter from a vessel which strikes the bar, springs a leak, signals the tug to take her back where she came from, and failing this makes sail for the nearest port of distress, as did the "Berwick".

Under another head, but of similar import "that the services were only towage services", are cited *The Catalina* and *The J. C. Pfluger*, but in the case of *The Catalina* (105 Fed. 633), the Court distinctly held the services to be salvage services, but salvage services

of a low order. There was nothing, however, in the facts of the case to make it a parallel case with the case at bar. It is the case of a broken propeller shaft, not of a vessel springing a leak the extent of which is unknown, and the injured vessel proceeding upon her course under sail. The degree of peril in which the Catalina was is no measure of the degree of peril in which the "Berwick" was, because the elements which constituted the peril are not the same.

In the case of *The J. C. Pfluger*, 109 Fed. 95, the Court says:

> "Under the plain and well settled rule declared in the foregoing cases whether a *particular service is one of salvage or towage is always a question of fact* to be ascertained from a consideration of the circumstances under which the Court shall find the service was rendered."

Upon a consideration of the particular facts of that case the Court concluded that the bark was in no immediate peril, and was not disabled to such extent as to justify any reasonable apprehension for her safety in the future if left to her own unaided efforts in making port.

The fact in the case at bar is that the lower Court did find the vessel in peril, and the finding is supported by reliable evidence.

That the appellant in suggesting this point did not appreciate the difference between a towage and a salvage

agreement is conclusively shown by his citation of authorities. He cites *The Wasp*, 34 Fed. 222, where the contract was towage pure and simple. When the tow was contracted for, no element of danger was present, but the tow was in a safe port and desirous of making a voyage to another port, and the tug was employed to supply the motive power. The tug took the Wasp in tow at Norfolk, Va., bound for New London, Conn. While on that voyage they met with heavy weather that caused them to go into the Delaware breakwater for safety, where the tow was anchored about half a mile below the breakwater. While there anchored a heavy sea came on, whereby one or two of the hatches of the tow were stove in, and some of the water passed into the hold. The master, wishing to move to a safer location, signalled the tug which had contracted to tow him to New London, for the purpose of making such move. The "America" being engaged in a towing service pure and simple, the move in question was part and parcel of her duty as the towing tug, and the "McCauley" when substituted for the "America" was carrying out the "America's" portion of that contract.

Of a like nature are the facts in the case of *The J. W. Husted*, 36 Fed. 604, also cited by libelant. There a lighter was going up the North River in tow of the tug "Chapman" and while so in tow shipped water through the effect of swells from passing steamers. This was the danger from which she was supposed to

have been rescued, it becoming necessary to take the tow toward shore and pump her out. The Husted performed this service, and in doing so simply succeeded the "Chapman", in carrying out the "Chapman's" contract.

The foregoing disposes of the appellant's point referred to by us in our opening, that the "Fulton" was bound by a *towage* contract to take the "Berwick" into Astoria. In this appellant has failed to distinguish between a *towage* contract and a salvage agreement. The facts of the case do not permit such a construction to be put upon what passed between the master of the "Fulton" and the master of the "Berwick". If the finding of the District Court with respect to the condition of the "Berwick" at the time she was picked up be sustained, as we assume it must be in view of what we have already said, then the agreement between the "Fulton" and the "Berwick" was one to tow a vessel in distress into a port of safety, leaving the compensation to be settled afterwards. If the vessel was the subject of salvage, the fact that the "Fulton" took hold of her by agreement, instead of picking her up without the assent of the "Berwick" does not render the service any the less salvage. It is also to be borne in mind that the performance of the agreement involved a *deviation* on the part of the "Fulton", which both parties to the contract must have known, was beyond the authority of the master of the "Fulton" to enter

upon for the purpose of towage, or for anything short of salvage. In the language of the learned Judge in *Connochie* vs. *Kerr*, 9 Fed. 54,

> "It is not to be presumed, therefore, that such a departure from the voyage of the (Fulton) was either asked for or assented to, except upon the ground that the (Berwick) was in actual need of assistance, through circumstances of apprehended danger, and that some salvage compensation was expected to be paid."

The "Escort's" Relation to the Contract with the "Fulton".

As already stated, we admit the appellant's contention that the "Escort" was merely a substitute for the "Fulton" in performing the service contracted for by the "Fulton". As we have seen, however, the duty, to be performed by the "Fulton" was not towage, but salvage. When the "Escort" paid the "Fulton" the amount he asked, and took the vessel in tow, he became entitled by novation to the full compensation that the "Fulton" would have been entitled to had she brought the vessel into the harbor. The entire service was a single salvage service rendered by two successive salvors, the first one of whom passed his claim along to the second salvor.

The most direct testimony upon this point is that of the master of the "Fulton" who says that he told the master of the "Berwick" that the "Escort" would take him in *on the same terms as those agreed upon with the "Fulton"* (p. 82). Though the master of the

"Berwick" does not appear to have made any reply, he assented to the arrangement by casting off the hawser of the "Fulton" and taking that of the "Escort". As between the "Fulton" and the "Escort", the arrangement was that the "Escort" should pay the "Fulton" one hundred dollars, for which sum he was to receive whatever was coming to the "Fulton" from the "Berwick" under their agreement (p. 83). Appellant suggests that the "Berwick" was no party to this latter arrangement. It is not necessary that he should be, for he had no concern with the terms upon which the steamers agreed as between themselves, so long as the "Berwick" was not called on to pay more than she otherwise would have been. His only concern was that he should be towed in as per his agreement with the "Fulton", and his acceptance in the manner above indicated, of the "Escort's" line was an assent to the novation of his indebtedness to the "Fulton".

The "Escort" thus had an agreement with the "Berwick" to finish the service, and by novation is entitled to the entire compensation.

Value of the Service.—It is contended that by virtue of the negotiations between the "Fulton" and the "Berwick", where one offered $100 and the other demanded $250, the award should be fixed within those limits. It cannot be contended, however, that these negotiations amounted to a contract. On the contrary it was agreed that the matter be left to future adjustment by the owners. When the "Escort" was substituted to

take the "Berwick" in "on the same terms", by that agreement the *owners of the former* were substituted for the *owners of the "Fulton"*, so far as relates to this adjustment, and when these owners came together, one of them thought at least $750 should be the figure. (p. 61.) Carrying appellant's suggestion, then, to its logical conclusion, we have an agreement that the amount should be adjusted by the owners, one owner offered $100, and the other demanded $750, and failing to agree, the matter is thrown into Court. By this, the final arrangement between the parties, the limits are fixed between $100 and $750, and so, on appellant's ~~new~~ showing, $500 was quite within the range of his suggestion.

Independent of the foregoing if we be right in our contention that the service was one of salvage, the amount awarded by the lower Court should not be disturbed, for this Court, in view of the conflict of testimony with respect to the danger to the vessel, and also the conflict with respect to the value of the vessel, would scarcely be warranted in saying that the amount fixed by the District Court was an abuse of discretion, and it is only in such instances that the Appellate Court would feel itself called upon to interfere.

The District Court found that the schooner "Berwick" was of the value of $5,000 (Finding B, p. 17). This is supported by the testimony of Captain Randall

(pp. 22–23) and that of Howe (p. 24). The testimony of the claimants would make the value very much less. The master fixes it at $2500, and admitting that under certain conditions she might bring more (p. 50), and Mr. Hume, the owner, admits that she might sell at private sale for $2,000, but contends that at public auction she would bring from anywhere from $500 to $1,000, if there was anybody bidding for her (p. 60).

We do not think it necessary to dwell upon this testimony, in view of the finding of the District Court.

Upon an established value of $5000, $500 can scarcely be held to be an abuse of discretion on the part of the District Court.

We respectfully submit that the decree of the District Court should be affirmed.

NATHAN H. FRANK,
Proctor for Appellee.